No. 91-1200

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

Without repeating all of the factual background in this case, Cincinnati must address one aspect of Respondents' statement of facts. Respondents note that "since the evidentiary hearing in this case, the City has twice revised its newsrack regulation." Respondents' Brief at 13. Respondents refer to administrative Regulation 67[1] in its original and revised versions.

By Respondents' own admission, these revisions are irrelevant to the present case. The constitutionality of Cincinnati's regulatory scheme at the time of the hearing may not be altered by subsequent interpretations.

However, the revisions, as Respondents know, were in response to the judicial rulings below. Cincinnati is merely attempting to comply with the existing judicial directives while this appeal is pending. Of course, as regards Respondents, there is a stay allowing the presence of Respondents' newsrack-type advertising dispensers on Cincinnati sidewalks. Other commercial publishers have filed requests in the interim to place newsrack-type advertising dispensers on public sidewalks and City officials must have guidelines to evaluate these requests. Therefore, Respondents' references to the Administrative Regulations as amended are misleading. The revisions are judicially compelled and implemented under protest. Respondents cannot now fairly argue otherwise.

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[1] An Administrative Regulation is a directive from the City Manager regarding the interpretation of certain sections of the Cincinnati Municipal Code. See Article 1, Section 7 of the Cincinnati Administrative Code, Appendix 1a to Reply Brief.

SUMMARY OF ARGUMENT

Respondents arguments must fail, because all of their arguments are based upon a single incorrect premise: That Cincinnati's regulatory scheme is a ban on speech. To the contrary, Cincinnati's regulatory scheme restricts a particular physical object (a newsrack-type advertising dispenser) affixed to public sidewalks on a semi-permanent basis. The regulatory scheme is not directly aimed at speech, it is aimed at the newsrack-type dispensing device, specifically its physical presence which detracts from the safety and esthetics of the public right-of-way. To be sure, speech is affected by the scheme, but the effect is incidental.

The underinclusiveness of Cincinnati's regulatory scheme, in that it allows newsrack-type devices containing newspapers and other forms of noncommercial speech, does not alter the fact that the regulatory scheme "directly advances" Cincinnati's substantial governmental interests in the safety and esthetics of the public right-of-way. Nor does the fact that alternative methods exist which may further Cincinnati's substantial governmental interests lessen the direct impact of the present scheme. Cincinnati need not completely accomplish its goals of providing a safe and attractive right-of-way as long as those goals are furthered to some degree by the challenged regulatory scheme.

While a balancing test is utilized to decide the constitutionality of regulations restricting commercial speech, Respondents have advocated a balancing of the wrong elements. The validity of the regulatory scheme depends upon the relation it bears to the overall interests Cincinnati seeks to further, not, as Respondents would have it, the extent to which the regulation furthers Cincinnati's interests in a particular case. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989).

Furthermore, Cincinnati's regulatory scheme burdens no more speech than is necessary to further its substantial governmental interests in the safety and esthetics of the public

right-of-way. Respondents' newsrack-type dispensing devices possess a physical presence which detracts from the safety and esthetics of the public right-of-way. Each such newsrack-type dispensing device removed from the public sidewalk, therefore, increases the safety and esthetics of the right-of-way. It is the physical presence of the dispenser that is detrimental to Cincinnati's interests and that is what is regulated. Respondents remain free to deliver their message through many alternative methods. As was earlier noted, Cincinnati need not totally or substantially "achieve" its desired objective, it need only "further" or "serve" those interests.

Additionally, Cincinnati's regulatory scheme is "content-neutral." The regulations are not "justified" with regard to the content of speech. Rather, the regulations are "justified" by a desire to improve the safety and esthetics of Cincinnati's public right-of-way. The scheme is not "content-based" merely because it impacts commercial and noncommercial speech differently.

Nor does Cincinnati's regulatory scheme vest "unbridled" discretion in governmental officials over whether to permit or deny expressive activity. The limiting interpretations of the administrative regulations and city manager's memoranda, and the long-standing practices of Cincinnati's officials substantially limit Cincinnati's discretion with regard to the granting or denying of permits for newsrack-type advertising dispensers.

Finally, Cincinnati's regulatory scheme may not be facially challenged as it relates solely to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). To the extent that the regulatory scheme may be challenged facially as it applies to noncommercial speech, Cincinnati's regulatory scheme is not substantially overbroad given the plainly legitimate scope of the statute. *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989). To the extent that such a challenge is successful, moreover, the regulatory scheme should be given a limiting construction, not wholly invalidated. *Burson v. Freeman* ___ U.S. ___, ___ n. 13, 112 S.Ct. 1846, 1857 n.13 (1992).

I. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI'S SIDEWALKS DIRECTLY ADVANCES CINCINNATI'S INTERESTS IN THE SAFETY AND ESTHETICS OF THE PUBLIC RIGHT-OF-WAY.

Respondents argue that Cincinnati's regulatory scheme does not directly advance its substantial governmental interests in safety and esthetics because Cincinnati could alternatively establish regulations regarding design, placement, and alignment of newsrack-type dispensers. This is an incorrect reading of the third prong of the *Central Hudson* test. A regulatory scheme does not fail to satisfy the requirement that it "directly advance" substantial governmental interests simply because those interests may be advanced in other ways.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), this Court determined that San Diego's regulatory scheme prohibiting offsite billboards directly advanced San Diego's interests in safety and esthetics. This Court did not require San Diego to merely establish design, placement, or alignment restrictions, though there is little doubt that San Diego could have passed such regulations had it been so inclined. Nor did this Court require Puerto Rico to exhaust every available legislative alternative in upholding Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents in *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986). As this Court stated in *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989):

> "[O]ur decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might *encourage*

> such gambling, but by promulgating additional speech designed to discourage it.' 478 U.S., at 344. Rather, we said that it was 'up to the legislature to decide' at that point, so long as its judgment was reasonable. *Ibid.* Similarly, in *Metromedia, Inc. v. San Diego*, 453 U.S., at 513 (plurality opinion), where we upheld San Diego's complete ban of offsite billboard advertising, we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the City's concerns for traffic safety and esthetics. It was enough to conclude that the ban was 'perhaps the only effective approach.' *Id.* at 508." *Id.* at 479.

Perhaps the best illustration of Respondents' faulty application of the third prong of the *Central Hudson* test is this Court's holding in *Metromedia* that San Diego's ordinance directly furthered the City's interest in safety and esthetics. While Respondents note the holding and attempt to distinguish it, they ignore the fact that San Diego's ordinance permitted onsite advertising. Therefore, like Cincinnati's regulatory scheme, San Diego's ordinance was clearly underinclusive. As Respondents note, this Court stated: "it is not speculative to recognize that billboards *by their very nature, wherever located and however constructed*, can be perceived as an esthetics harm." 453 U.S. at 510 (Respondents' Brief at 25.) Yet, it is clear that under the San Diego ordinance onsite billboards would continue to detract from the safety and esthetics of San Diego's public way. However, this underinclusiveness did not detract from the efficacy of the restriction on offsite billboards. As this Court noted:

> "Whether onsite advertising is permitted or not the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." 453 U.S., at 511.

Similarly, Cincinnati's refusal to permit Respondents to place their advertising dispensers on Cincinnati's sidewalks directly furthers the City's interest in safety and esthetics. Respondents'

dispensers possess a noncommunicative physical presence that detracts from the safety and esthetics of the right-of-way. Prohibiting this presence, consequently, increases the safety and esthetics of the right-of-way. The impact of Cincinnati's regulatory scheme is therefore both direct and effective. Neither the fact that the scheme is underinclusive, nor the fact that other schemes may also further Cincinnati's interests, alters the direct and effective impact of the present regulatory scheme as applied to Discovery and Harmon.

II. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI'S SIDEWALKS DIRECTLY ADVANCES CINCINNATI'S INTEREST IN CURBING THE PROLIFERATION OF NEWSRACK-TYPE DISPENSERS.

Respondents argue that Cincinnati's refusal to permit the presence of newsrack-type commercial handbill dispensers on its sidewalks does not directly advance Cincinnati's interest in proliferation. Respondents state: "There is no evidence that the total number of newsracks on the public right-of-way will decrease as a result of the ban." Respondents' Brief at 28. Respondents ignore, however, that Cincinnati's regulatory scheme would decrease the number of newsrack-type devices by at least sixty-two (62).[2] Since the number of newsracks present on Cincinnati's sidewalks are reduced by the regulatory scheme, the scheme directly furthers Cincinnati's interest in curbing proliferation.

Respondents further state:

> The City essentially concedes in inefficacy of the ban in advancing its esthetics and safety concerns,

[2] Respondents do, however, acknowledge this later in their Brief. Respondents' Brief at 35. It should also be noted that this number consists of only Discovery's and Harmon's dispensers and does not include other commercial publications that presently occupy Cincinnati sidewalks (such as Christian Singles and CarScope) or that may seek to occupy those sidewalks in the future.

> for it states that 'sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers' despite the ban. (Citation omitted.) Whereas, in *Metromedia*, the City of San Diego's proposed ban on all offsite billboards would have, as the parties stipulated, 'eliminate(d) the outdoor advertising business in the City of San Diego'. . . . Respondents' Brief at 29.

Cincinnati has certainly not conceded that its regulatory scheme is inefficient in advancing its substantial interests. The only thing that Cincinnati concedes is that its scheme does not totally eradicate the problems to which its regulations are addressed. It has already been noted that Cincinnati need not address all safety and esthetics concerns at one time, or none at all. It should also be noted that Respondents' reference to *Metromedia* is misleading. San Diego's regulatory scheme was underinclusive, permitting the existence of onsite billboards. The effect of the ban on the "outdoor advertising business" does not alter the fact that San Diego's public ways would continue to be adversely affected by the continued presence of onsite billboards.[3] There was no claim in *Metromedia* that billboards would cease to exist, as Respondents imply.

Respondents argue further that since Cincinnati has not restricted the total number of newsrack-type dispensers that may be placed on Cincinnati sidewalks, its regulatory scheme is an " 'ineffective' means of addressing the City's proliferation concerns." Respondents apparently seek to add a new element to the *Central Hudson* test, the "effective means" requirement. No such test appears in any of this Court's previous jurisprudence. While a regulation must directly advance a substantial governmental interest, there is certainly no requirement that the regulation be the most "effective

[3] The passage cited by Respondents proves nothing more than the common sense notion that business owners who rent or own the premises upon which their businesses sit ordinarily may place a billboard or other sign upon that premises and are therefore unlikely to pay an advertising firm for that privilege.

means" of furthering governmental goals. To the contrary, as this Court noted in *Fox*:

> "In sum, while we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the harmless from the harmful, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end." *Id.* at 480.

Consequently, while the restriction upon the overall number of newsrack-type dispensers may be one "effective means" of addressing proliferation concerns, it is not required. Cincinnati's regulatory scheme, as it stands, will directly advance its concerns regarding proliferation, by reducing the number of newsrack-type dispensers by at least sixty-two (62). The present scheme may be underinclusive, but that does not render it unconstitutional under *Central Hudson*.

Furthermore, this Court should not require Cincinnati to use the most "effective means." Obviously, the most "effective" way for Cincinnati to address its concerns would be to prohibit access to Cincinnati's sidewalks for all types of publications. However, while this may be the most effective means, it is also more burdensome upon speech than the current regulatory scheme. Respondents ignore the fact that the underinclusive aspects of Cincinnati's regulatory scheme are present in deference to the greater protection and value of core political speech. A blanket prohibition would be more "effective," but it would also be substantially more burdensome upon speech. Respondents' suggestion that this Court adopt an "all or nothing" approach in this area of the law is therefore ill-advised.

Additionally, limiting the total number of newsrack-type dispensing devices at the present poses substantial problems given the current state of the law. Under *Metromedia*, awarding space to a commercial publication to the exclusion of a

noncommercial publication would be a First Amendment violation. Conversely, awarding the space to a noncommercial publication to the exclusion of a commercial publication would violate the Sixth Circuit's interpretation of the law. It has been noted that the Court of Appeals does not consider *Metromedia* binding in the Sixth Circuit. It is true, as Respondents point out, that Cincinnati has revised its Administrative Regulations to attempt to keep current with the various rulings in this case. It is also true that Cincinnati has attempted to accomplish this without violating First Amendment rights. These attempts to remain current do not alter the fact that Cincinnati's regulatory scheme as applied to Respondents' activity directly furthers all of its stated substantial governmental interests.

III. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI SIDEWALKS BURDENS NO MORE SPEECH THAN IS NECESSARY TO FURTHER CINCINNATI'S SUBSTANTIAL GOVERNMENTAL INTEREST IN THE SAFETY AND ESTHETICS OF ITS PUBLIC RIGHT-OF-WAY.

A. The validity of Cincinnati's regulatory scheme depends upon the relation it bears to the overall problems Cincinnati seeks to correct, not upon the extent to which it furthers Cincinnati's interests in a particular case.

Respondents argue that the Sixth Circuit Court of Appeals correctly engaged in a balancing test. While Cincinnati agrees that a balancing test is necessary, Cincinnati believes that the Sixth Circuit Court of Appeals balanced the wrong things. In focusing upon the effect of Cincinnati's regulation, or the degree to which Cincinnati's interests were furthered in this particular case, the Court of Appeals erred. The degree to which Cincinnati's interests are furthered, or the effect of the regulation in a particular case, is simply not the relevant inquiry. The proper focus is upon the relationship

the scheme bears to the overall problem Cincinnati seeks to correct. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). The Court of Appeals cannot have struck the proper balance, because it was balancing the wrong things.

B. Cincinnati's regulatory scheme burdens no more speech than is necessary to further its interests in the safety and esthetics of the public right-of-way.

Cincinnati has never claimed nor assumed that Respondents' advertisements themselves are not entitled to some degree of First Amendment protection. Respondents' statements to the contrary are simply false. (Respondents' Brief at 33.) In arguing that Cincinnati's regulatory scheme imposes heavy costs upon Discovery, Harmon, and the public, Respondents have greatly exaggerated the applicability and scope of the regulatory scheme.

Respondents state that "the speech at issue is not false or misleading and. . . . Discovery and Harmon promote activity that is not at odds with any governmental interest." (Respondents' Brief at 33.) That may be true, but it is also irrelevant. Cincinnati's regulatory scheme does not prohibit Discovery or Harmon from speaking or promoting activity. Rather, Cincinnati merely prohibits Discovery and Harmon from placing newsrack-type dispensers upon sidewalks in order to distribute advertising material. The dispenser's physical presence is at odds with substantial governmental interests in promoting the safety and esthetics of the public right-of-way. Both Discovery and Harmon are free to speak about their activities and promote their programs, even in the public right-of-way, as long as they do not do so through the use of these newsrack-type dispensing devices.[4]

Cincinnati does not contend that Discovery's and Harmon's *speech* is not important. However, Cincinnati is simply not, as Respondents suggest, "banning" their "speech." Cincinnati is merely trying to keep its public ways safe and

[4] In fact, Respondents' obviously utilize other methods of communicating their messages.

attractive. Undoubtedly, in attempting to pursue these goals, Cincinnati's regulatory scheme has incidentally limited Respondents' conduct in a particular forum. But it is important to note that only one method of distribution (newsrack-type dispensing devices) in one particular forum (public sidewalks) is being restricted. Furthermore, this conduct and forum are being restricted in order to further substantial governmental goals; keeping public right-of-ways safe and attractive by reducing the physical presence of newsrack-type dispensers.

Respondents' reliance upon *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) and *Posadas* is, therefore, misplaced. In both *Linmark* and *Posadas*, the challenged regulations were directed toward protecting the public from the message conveyed by the particular speech in question. In the present case, Cincinnati is merely attempting to protect the public from the effects of the physical presence of newsrack-type dispensers on public sidewalks. The speech itself is not prohibited. Rather, only the physical presence of the dispensers upon a particular area, the public sidewalks, is prohibited. The impact upon speech is incidental, not direct, and is not directed at the speech conveyed, or any message communicated by the speech, but, rather, at one particular method and mode of distribution.

Additionally, the restriction on the method and forum burdens no more speech than is necessary to further Cincinnati's interests in a safe and attractive right-of-way. To the extent that Respondents wish to convey their message without utilizing newsrack-type dispensers they are free to do so. However, each newsrack-type dispenser excluded from Cincinnati's sidewalks furthers Cincinnati's interests in traffic safety and esthetics.

C. Any of Respondents' speech incidentally burdened by Cincinnati's narrow proscription furthers Cincinnati's substantial governmental interest.

Respondents assert that Cincinnati's regulatory scheme has "de minimus" benefits for Cincinnati. Respondents' Brief at 35-40.

Respondents claim that *Fox* holds that Cincinnati must "achieve the desired objective" in order for the regulatory scheme to be upheld. *Id.* at 37.

However, as *Fox* itself clearly states, the governmental objectives need not be totally or even substantially "achieved," rather those objectives need only be served or furthered to the extent they are addressed. 492 U.S., at 476-480. Additionally, Respondents' arguments are very similar to those made by the appellants in *Metromedia*. As this Court there stated:

> It is nevertheless argued that the City denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite . . . advertising and other specified signs. Appellants question whether the distinction between onsite and offsite advertising on the same property is justifiable in terms of either esthetics or traffic safety. The ordinance permits the occupants of property to use billboards located on that property to advertise goods and services offered at that location: identical billboards, equally distracting and unattractive, that advertise goods or services available elsewhere are prohibited even if permitting the latter would not multiply the number of billboards. Despite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising. (Citations omitted.) We agree with those cases and with our own decisions in (citations omitted).
>
> In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. 453 U.S., at 510-511.

Similarly, the underinclusiveness of Cincinnati's regulatory scheme as applied to newsrack-type dispensing devices containing noncommercial publications does not alter the fact that the prohibition of dispensers containing commercial publications directly furthers Cincinnati's interests in the

safety and esthetics of its public right-of-ways. Cincinnati need not address all of its esthetics and safety concerns with the scheme. Rather, Cincinnati is free to decide that in a limited instance – distribution of noncommercial publications – its interests in safety and esthetics may partially yield.

It should also be noted that since Cincinnati's regulatory scheme is narrowly drawn, the scheme affects only speech that detracts from Cincinnati's interests. The only conduct proscribed is placing a dispenser on the sidewalk in order to distribute commercial speech. In this way, Cincinnati's regulatory scheme is vastly different from the regulations involved in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) or *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, for example, this Court noted:

> In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertising at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding. * * * As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S., at 771, 433 U.S., at 383-84.

In both *Virginia Pharmacy Board* and *Bates* the challenged regulations sought to ban speech in order to protect the public from the message sought to be conveyed. The impact of the message itself was the focus of the government's interest.[5] Therefore, merely prohibiting distribution in a particular forum would have been wholly ineffective to further the government's goals.

In contrast, Cincinnati's regulatory scheme is not directed at speech. It merely prohibits the physical presence

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[5] In this regard, *Virginia Pharmacy Board* and *Bates* are similar to the regulation upheld by this Court in *Posadas*.

of a dispenser. Cincinnati is not claiming that Respondents' message will have a deleterious effect upon the public. However, Respondents' speech is not in any sense "banned." Respondents are free to otherwise convey their message. The fact that their access to one particular forum has been limited does not mean that their speech has been "banned." The speech is obviously not the focus of the regulation. Rather, the regulatory scheme prohibits only the placement of newsrack-type dispensing devices upon the public sidewalks. Further, these devices are prohibited only because their physical presence detracts from the safety and esthetics of the public right-of-way in Cincinnati. The effect of the message is not Cincinnati's concern in this case. It is the effect of the physical presence of the newsrack-type dispensers that is Cincinnati's concern, and that is what is being regulated. Cincinnati need not restrict speech further in order to have its regulatory scheme upheld.

IV. CINCINNATI'S REGULATORY SCHEME IS CONTENT NEUTRAL.

Respondents assert that Cincinnati's regulatory scheme is content based because it distinguishes between dispensers containing commercial pamphlets from those containing noncommercial speech. Respondents state: "The City's sole justification for its ban, both in the district court and on appeal, has been its ability to draw a content-based distinction between commercial and noncommercial speech due to the "lesser protection" accorded the former. (Respondents' Brief at 40-41.) This is an inaccurate portrayal of Cincinnati's position, but it does serve to illustrate Respondents' misunderstanding of the issues involved in the present case.

Cincinnati is limiting Respondents' access to public sidewalks because their dispensers detract from the safety and esthetics of the public right-of-way. Cincinnati's desire to keep its right-of-way safe and attractive has nothing to do with the message conveyed by Respondents' pamphlets. Indeed, if the regulatory scheme were directed toward the message or viewpoint sought to be conveyed, it would be

wholly ineffective because Respondents' remain free to otherwise convey their message. The distinction between commercial speech and noncommercial speech, and the differing levels of otherwise protection afforded them, is the reason that newsracks containing newspapers are permitted to remain upon Cincinnati's sidewalks. However, this does not mean that Cincinnati's regulations are based on the distinction. The basis of the regulation is the safety and esthetics of the public right-of-way. The scheme is not "content-based" simply because it may have a different impact on commercial speech.

Respondents also argue that Cincinnati's regulatory scheme fails the "content-neutral" requirement because the secondary effects of newsrack-type dispensers containing commercial and noncommercial publications may be similar. However, in *Boos v. Barry*, 485 U.S. 312 (1988) this Court stated:

> So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded (in *Renton v. Playtime Theaters, Inc.* 475 U.S. 41 (1986) that the regulation was properly analyzed as content-neutral." *Id.* at 320.

In the present case, the justification for Cincinnati's prohibition of newsrack-type advertising dispensers containing commercial pamphlets has nothing to do with the actual publications being distributed. Rather, the regulatory scheme is directed toward remedying the detrimental effects such dispensers have on Cincinnati's public right-of-way. This is evidenced by the myriad methods available to Discovery and Harmon to convey their intended message. Since the justifications have nothing to do with content, the regulatory scheme is properly analyzed as content neutral.

V. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF NEWSRACK-TYPE ADVERTISING DISPENSERS UPON PUBLIC SIDEWALKS IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. Cincinnati's regulatory scheme does not vest unbridled discretion in a governmental official over whether to permit or deny expressive activity.

When a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. This rule applies even if the face of the law might not otherwise suggest the limits imposed. Further, this Court will presume any narrowing construction or practice to which the law is fairly susceptible. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11 (1988). Furthermore, in expounding a statute, this Court will not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 515 (1989).

Respondents claim that Cincinnati's regulatory scheme vests unbridled discretion in governmental officials because the scheme inadequately defines the terms "commercial handbill," "noncommercial handbill" and "newspaper." This lack of definitions, Respondents argue, raises the specter of content or viewpoint based censorship.

However, Mr. Young, the City Engineer, testified in his deposition, and at the trial, that in making determinations as to whether a particular publication constituted a "commercial handbill" or "noncommercial handbill" or a "newspaper" he relied upon a memorandum from the city manager dated February 7, 1990 in which Administrative Regulation 38 is interpreted. (Deposition of Thomas Young at 9; J.A. 110-111.) This memorandum directs the Public Works Department to limit approvals under Administrative Regulation No. 38 to daily or weekly publications primarily presenting coverage of, and commentary on current events. (J.A.

229-30.) Therefore, some meaningful limiting interpretations have been formulated in order to discourage potential abuse and limit discretion.[6]

Additionally, it has clearly been Cincinnati's practice to allow newspapers to distribute their messages through the use of newsrack-type dispensing devices. (J.A. 224-228, 231-235, 253-261, 386-398.) This practice should alleviate any fears regarding the application of the regulatory scheme to newspapers. While "newspaper" may not be specifically defined in the regulatory scheme, it is not such a vague term that Cincinnati's regulatory scheme is rendered facially unconstitutional solely upon the basis that the term "newspaper" is not specifically defined.

Finally, Respondents assert that Cincinnati's regulatory scheme confers an advantage upon newspapers in the competition for advertisers. This is untrue. This Court has made it abundantly clear that noncommercial speech is to be afforded deference over commercial speech. See, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 490 (1981). Cincinnati's regulatory scheme merely reflects the deference that this Court has demanded.

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[6] Furthermore, unlike the ordinance involved in *Lakewood*, Regulation 38 requires the city manager or his designee to respond to requests to place vending devices in the right-of-way with reasonable dispatch. Regulation 38 states in pertinent part:

> The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the devices. Approval or denial must be determined within five business days. * * * The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection.

Also, persons wishing to place what they believe are conforming dispensers upon Cincinnati's sidewalks are afforded a hearing in front of the Sidewalks Appeal Committee. J.A. 120-121. If this administrative appeal is unsuccessful, a dissatisfied applicant can seek relief from Ohio courts under state law. Ohio Rev. Code Ann. § 2506.01 *et seq.* See, 486 U.S., at 793 n.13 (White, J., dissenting.)

B. Facial challenges are inappropriate as applied to regulatory schemes which affect only commercial speech.

As this Court stated in *Bates v. State Bar of Arizona*:

> The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, e.g. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960); *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936) (Brandis, J. concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terroum* effect of the statute. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.
>
> But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S., at 771 n.24, there are 'comm[illegible]-sense differences' between commercial speech and other varieties. See also *Id.*, at 775-781 (concurring opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *Id.*, at 771-772 n.24. 433 U.S., at 380.

Since Cincinnati's regulatory scheme, both on its face and as it has been interpreted, applies only to the placement

of newsrack-type advertising dispensers on Cincinnati's sidewalks, Respondents' challenge is improper under *Bates*.

It is true that a statute which reaches both noncommercial and commercial speech may be challenged as overbroad as it applies to noncommercial speech.[7] *Fox*, 492 U.S., at 484. However, in order to be facially invalidated the statute's overreach must be substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep. *Id.* at 485.

Respondents contend that Cincinnati's regulatory scheme is unconstitutionally overbroad because the definitions are not specific enough to give notice to potential speakers of whether their particular publications would be granted a "newsrack" permit. Respondents contend that the lack of a particular percentage of noncommercial versus commercial speech that must be contained within a particular publication in order to be granted a newsrack permit is fatal to Cincinnati's regulatory scheme. Respondents' Brief at 48-50.

However, no publications containing fifty percent (50%) advertising and fifty percent (50%) coverage of current events are seeking permission to place newspaper vending devices upon public sidewalks. Furthermore, to the extent that such publication were considered a "newspaper," it would clearly qualify for a newsrack permit under Cincinnati's regulatory scheme. To the extent that the publication contained at least fifty percent (50%) coverage of current events, it would also qualify for a newsrack permit. Certainly, if the publication contained no commercial speech, it would qualify for a newsrack permit under the scheme. Of course, even if a particular publication contained less than fifty percent (50%) coverage of current events, such publication would qualify for a newsrack permit if the noncommercial speech was "inextricably intertwined" with commercial speech.

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[7] There can be no question that the regulatory scheme, as it applies to Discovery and Harmon regulates only commercial speech. J.A., 31, 139-40, 167.

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988).[8]

Moreover, assuming the existence of such hypothetical publication, Cincinnati's regulatory scheme "is not substantially overbroad." The regulatory scheme would only prevent such a publication from dispensing its message through a newsrack-type dispensing device placed upon the public sidewalk. Many other channels of communication would remain open to such a publication to deliver its message. The limited restriction upon the hypothetical publication does not constitute such substantial overbreadth so as to render Cincinnati's regulatory scheme unconstitutional.[9]

CONCLUSION

For the above reasons, Petitioner urges this Court to reverse the decisions of the Court of Appeals and the District Court and uphold Petitioner's statutory scheme as constitutional as applied and enter judgment in favor of Petitioner Cincinnati.

Respectfully submitted,

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[8] This was not the case with the publications of Discovery and Harmon, J.A. 30.

[9] Furthermore, these arguments are "as applied" challenges that should be made by a publication denied a newsrack permit under Cincinnati's regulatory scheme. If successful, these challenges call for a limiting construction rather than a facial invalidation. *Burson v. Freeman*, ___ U.S. ___, ___, n.13, 112 S. Ct. 1846, 1857 n.13 (1992).

APPENDIX

§ 7. Departmental Rules and Regulations.

The city manager may prescribe rules and regulations for the general conduct of the administration subject to the authority of the city manager. The director of each department and the administrative officer of each other office subject to the authority of the city manager may prescribe rules and regulations for the proper conduct of the department or office, but such rules or regulations shall not go into effect unless approved by the city manager. The city manager may at any time revoke, suspend or amend any such rule or regulation by whomever prescribed.

(Amended by Ord. No. 299-1979, eff. Aug. 4, 1979; repealed and reordained by Ord. No. 183-1981, eff. June 12, 1981)